In the Supreme Court of the United States.

OCTOBER TERM, 1897.

SARAH A. OAKES, APPELLANT,
v.
THE UNITED STATES.
No. 211.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the appellant in an action prosecuted under a special act of July 28, 1892 (27 Stat. L., 320).

The facts in the case are briefly as follows:

Early in the late civil war the captain of the steamer *Eastport*, plying on the Mississippi and other Western rivers, without the knowledge of the owners of the vessel, took her from Paducah, Ky., the port of her enrollment, to a place on the Tennessee River within the lines of the Confederate forces.

Shortly after the vessel reached the point within the Confederate lines she fell into their possession, whether by purchase from the captain of the vessel or otherwise does not definitely appear. Nevertheless, work was soon thereafter begun on the vessel, under the authority of the Confederate government, by which the vessel was undergoing transformation into a gunboat for use in the Confederate service. While this work was in progress, and before the vessel had been used in any hostile demonstration against the United States, she was captured by a detachment of men in small boats from certain gunboats of the United States Government and taken to Mound City, Ill., where the reconstruction into a gunboat was continued, and the vessel was thereafter used as such by the United States until blown up in 1864, by the United States officers in charge of her, to prevent her capture by the enemy.

The vessel was captured, as above stated, by the United States Government February 7, 1862, at which time the naval forces operating in all the Western rivers were under control and subject to the orders of the War Department.

Soon after the capture of the vessel, as above recited, certain libel proceedings were instituted against her in the district court of the United States for the southern district of Illinois, pursuant to the only then existing confiscation act, the one of August 6, 1861 (12 Stat. L., 319), wherein a decree in condemnation, forfeiting the vessel to the United States, was rendered, and the vessel ordered sold at public auction, which was done by the

marshal of the district, and the vessel bid in, in the name of the United States, for $10,000. All of which is fully set forth in the findings of fact rendered by the lower court.

SCOPE OF THE SPECIAL ACT.

No other action was taken in regard to the vessel, and the rights in connection therewith of any of its owners, prior to its capture from the Confederate forces, and nothing was done by the owners thereof until July 28, 1892, when the following special act (27 Stat. L., 320) was passed by Congress:

AN ACT to confer jurisdiction on the Court of Claims to hear and determine the claim of the heir of Hugh Worthington for his interest in the steamer *Eastport*.

Whereas it is claimed the steamer *Eastport* was taken by the United States anno Domini eighteen hundred and sixty-two, and converted into a gunboat; and

Whereas it is claimed at the time of such taking one Hugh Worthington, then of Metropolis, Massac County, Illinois, but since deceased, was the owner of three-fifths interest in said steamer, and no compensation has been paid to said Hugh Worthington or his heirs; and

Whereas his daughter, Mrs. Sarah A. Oakes, of Metropolis, Illinois, claims that Hugh Worthington was a loyal citizen, that she is his only heir at law, and is justly entitled to receive from the United States compensation for the value of her father's interest in said steamer: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred

upon the Court of Claims to hear and determine what are the just rights in law of the said Sarah A. Oakes as heir of Hugh Worthington, deceased, and that from any judgment so entered by said Court of Claims either party may appeal to the Supreme Court of the United States, for compensation for the value of said Worthington's interest in said steamer *Eastport*. That upon proper petition being presented by said Sarah A. Oakes, her heirs, executors, or administrators, to said court, said court is authorized and directed to inquire into the merits of said claim, and if on a full hearing the court shall find that said claim is just, the court shall enter judgment in favor of the claimant and against the United States for whatever sum shall be found to be due.

SEC. 2. That in case judgment shall be rendered against the United States, the Secretary of the Treasury shall be, and he is hereby, authorized and directed to pay the claimant, her heirs, executors, or administrators, whatever sum shall be adjudged by the court to be due, out of any money in the Treasury not otherwise appropriated.

Approved, July 28, 1892.

In the lower court the claimant contended, and still contends, that the act above quoted did more than remove the bar of the statute of limitation; that is, that rights other than remedial were conferred by the special act. Claimant also contended, and still contends, that the proceedings in the district court for the southern district of Illinois, resulting in the condemnation and sale of the vessel, were null and void. It is also contended by the claimant that the title of the owner was never divested. In support of this proposition the claimant relies upon the provisions of the *Act of March 3, 1800* (2 Stat. L., 16).

The answer to the first proposition, that the special act conferring jurisdiction upon the Court of Claims in this case did more than remove the bar of the statute of limitation, can not be better stated than in the langauge of the court below:

> When the statute subsequently says the court shall enter judgment if it be found that said claim is just, it means just in law, as previously prescribed. The rights to be determined are legal rights. * * * The court is authorized to judicially inquire into and ascertain the "just rights in law of the claimant and her ancestor. Otherwise the act would merely devolve upon the court the duty of ascertaining the facts, and then, without reference to the legal rights of the parties at the time of the capture or sale of the vessel, to proceed to assess the damages, thereby constituting the court a jury shorn of judicial discretion."

This question is fully discussed, and the inapplicability of the authorities cited by the claimant clearly shown, in the opinion of the lower court.

BUT ONE CAPTURE OF ARMY OR NAVY.

The claimant contended in the court below, and still contends, that "at the time of its recapture the vessel was upon navigable waters, and therefore subject to be taken as prize, and was so taken by a vessel acting under authority from the Government of the United States," and that, therefore, it was a maritime capture and subject to the provisions of the *Act of March 3, 1800* (2 Stat. L., 16).

In this connection counsel for appellant argues:

> If it be conceded that the *Conostaga*, *Tyler*, and *Lexington* were not part of the Navy of the United States, but were a part of the Quartermaster's Department of the Army, they were at least vessels acting under authority of the United States Government, and the statute of March 3, 1800, is not intended to control captures made by the Navy alone, but applies with equal force to captures of vessels belonging to the War Department, the Customs Revenue Service, the Light-House Board, or any other branch of the Government requiring the service of vessels upon navigable waters.

The court below disposed of the contention by holding that the taking of the vessel was not a maritime capture, but was a capture by the Army, and that therefore the title of the claimant's intestate thereby became divested and vested in the United States. In its opinion the court says:

> In the *Case 269½ Bales of Cotton* (1 Woolworth, 236–256) the court, by Mr. Justice Miller, in speaking of the capture of cotton on the 26th September, 1862, by vessels used as transports on the Mississippi River, said: "From that statement it is not at all inferable that the vessels named were any part of the naval force of the United States. Indeed, we know that no naval force then existed on those waters. The gunboats were made a part of the Navy by order of the Government on the 1st day of October, several days after the capture." And further along, at page 257, it is said: "In short, the entire statement is consistent with the fact that the vessels and crews were in the employment of the War Department, and were used merely as

transports to carry the troops; and it is consistent with no other supposition."

The counsel for the claimant replies to this proposition with the statement that the naval officers were not under the command of or even a part of the forces of the Army of the West except in theory, and he suggests that one reason why the flotilla was organized and equipped in the Quartermaster's Department of the Army rather than by the Navy Department was because the Quartermaster's Department had an available appropriation for the work and the Navy Department had none. The decision of the Court of Claims, with its abundant sustaining authorities, in answering this contention, finds clear and exact expression in the words of the cited opinion of Justice Miller, of this court, where he says:

> Indeed, we know that no naval force then existed on these waters. * * * In short, the entire statement is consistent with the fact that the vessels were in the employment of the War Department and were used merely as transports to carry troops.

Equally pertinent is the language of Justice Strong in the Cotton Plant Case (10 Wall., 580):

> There was nothing in the situation of the property that required peculiarly a naval force or maritime service to effect its capture.

The scope of the decision in the court below is presented in the following paragraphs from its opinion:

> It will not be necessary to consider the question of a joint capture by the Army and Navy, as the findings show that the recapture, if such it was, was by the officers and men of vessels in the Navy

under the control of the War Department, so that the Army and the naval forces within the territory or district of the captured vessel were necessarily acting under the orders of the same military commander.

We hold that the vessel was captured by the Army, and that therefore the title of the claimant's intestate thereby became divested and vested in the United States.

It is well settled and not questioned in this case that if the vessel in controversy was captured by the Army the title thereto passed as soon as the capture was complete; while if captured by the Navy as prize the title would not pass until condemned as provided by law. (Halleck's International Law, ch. 30, secs. 1 and 2; the ship *Resolution*, 2 Dall., 1; the *Adventure*, 8 Cranch, 221; the *Sally Magee*, 3 Wall., 451; the *Peterhoff*, Blatchford, R., 620; the *Neustra*, etc., 108 U. S., 92.)

This phase of the question is so fully and so ably treated in the opinion of the Court of Claims that a further discussion of it would be needless elaboration.

"A VESSEL OF WAR" IN THE ACT OF 1800.

In the lower court the claimant contended, and in the brief and argument for this court still contends, that the facts in this case are such as to bring it within the provisions of the *Act of 1800* (2 Stat. L., 16).

The first section of that act, which is the only one applicable to this case, is as follows:

That when any vessel other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessel, acting under

authority from the Government of the United States, shall appear to have before belonged to any person or persons residents within or under the protection of the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government, or state against which the United States have authorized, or shall authorize, defence or reprisals, such vessels or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, if retaken by a public vessel of the United States, one-eighth part, and if retaken by a private vessel of the United States, one-sixth part of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war, before such capture or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay for and in lieu of salvage one moiety of the true value of such vessel of war or privateer.

In concluding the opinion of the court below, Judge Peelle said:

> And it is therefore unnecessary to consider the other, perhaps more important, question as to whether the captured vessel, which was undergoing conversion into a gunboat for use in the Confederate service, would fall within the meaning of the act of 1800 (*supra*) as "a vessel of war" as set forth in the first clause of the section quoted.

The consideration of this question is, however, pertinent here.

If the vessel, when captured by the Union forces, was "a vessel of war," as set forth in the first clause of the section, it is clearly excluded from the provisions of the act of 1800. What are the facts?

Finding V, in the court below, clearly sets forth that "while said vessel was lying under the bank of the river and being converted into a gunboat, for use in the Confederate service as aforesaid, *with the iron and other material therefor on board* * * * she was captured," etc.

In Vattel's Law of Nations we find (p. 394) that the definition of "the things which belong to war and are the instruments of war" are "arms of all kinds, artillery, gunpowder, saltpeter and sulphur of which it is composed, ladders, gabions, tools and all other implements for sieges, *materials for building ships of war;* * * * these always belong to war." In this connection, the facts show that the vessel had become so far identified as a vessel of war as to have *lost all value except as such.* That additional labor was required upon the vessel may show it to be unfinished, but does not show that the parts and materials made for adjustment were not really a part of the unfinished subject. The vessel was "being converted into a gunboat, for use in the Confederate service, with the iron and other material therefor on board; * * * the vessel was dismantled, her upper works, cabin, pilot and wheel house having been cut away."

In this condition the vessel was taken by the Union forces to Mound City, Ill., and at that time was so nearly

a vessel of war, and so nearly in a condition for war service, that the Union forces, upon the recommendation of Commodore Foote, continued the work, which the Confederate forces had begun, and shortly thereafter the vessel went into commission with a full complement of men and officers of the United States Navy, and was so used on the Mississippi River as a part of a Mississippi squadron, and continued in active service as a gunboat until April 17, 1864 (Finding VI, court below).

Surely it can not be denied that the *Eastport* when taken by the Union forces was, to all intents and purposes, the same vessel of war which was afterwards used by the Union forces for two years, with the simple addition by them of such work as was necessary to complete the vessel of war which the Confederates were making of the *Eastport* when she was captured.

In first Brock (p. 428) Chief Justice Marshall, in delivering the opinion of the court in *The Brig Wilson Case*, said:

> The term "ship or vessel of war" has been considered, and I think properly considered, as a generic term, including both national ships and private armed ships. The authorities cited at the bar show that courts and writers on public law have used the term in this general sense. If either the language or the objects of this law be consulted I think they strengthen this natural and comprehensive construction of these words. * * * The privateer which acts as a merchant vessel must be treated and considered as a merchant vessel.

And we submit that, conversely, the merchant vessel which acts or is prepared to act, or which is being pre-

pared to act, as a vessel of war must be treated as "a vessel of war."

If the *Eastport* when captured was not a vessel of war, what was it?

It can not be said to have been any kind or character of vessel other than a vessel of war nearing completion. When captured the vessel was dismantled; her upper works, cabin, pilot, and wheelhouse were cut away; iron and other material necessary for making the *Eastport* a vessel of war were on board. Shortly thereafter the vessel, with a full complement of men and officers, took her place as one of the vessels of war of the United States Navy. We must insist that when captured the *Eastport* had lost all identification and all value except as a vessel of war; that she was in fact a vessel of war, and, as such, excluded from the provisions of the act of 1800.

THE VESSEL ITSELF CONTRABAND.

As an additional reason why appellant should not recover in this case, we contend that under the *act of August 6, 1861* (12 Stat. L., 319), the vessel itself was contraband property, it having been voluntarily delivered to the enemy to be used by them as a vessel of war by the agent or employee of the owner thereof. Thus the title in the vessel was divested as soon as the owner or his agent voluntarily suffered the property to fall into the hands of the enemy. It was, from and after that time, lawful subject of capture wherever found, and, when captured, whether as prize or otherwise, the title at once vested in the United States. The first section of the act

of August 6, 1861, under authority of which all proceedings in this matter were instituted, reads as follows:

> That if, during the present or any future insurrection against the Government of the United States, after the President of the United States shall have declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or persons, his, her, or their agent, attorney, or employee, shall purchase or acquire, sell or give any property of whatsoever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such insurrection, etc. * * * All such property is hereby declared the lawful subject of prize and capture wherever found. * * *

We presume that it will be conceded, in this connection, that if the owner of the vessel had personally delivered her into the possession of the enemy, or had personally suffered her to fall into their possession, he would have forfeited thereby all right to recover the value of the vessel if recaptured by the Union forces. Is it not, therefore, equally clear that by the provisions of the act of August 6, 1861, *supra*, the owner is held to a strict and identical responsibility, and made to occupy precisely the attitude and be responsible for the acts of his "agent or employee?"

In this case, while it was not the owner of the vessel who "sold or gave" the property "with intent to use or employ the same, or suffer the same to be used or em-

ployed, in aiding, abetting, or promoting" the insurrection, it was his agent, or in any event his "employee" (the captain of the vessel, so appointed by the owner thereof), who thus sold or gave the property to the enemy, or who at least voluntarily suffered it to come into their possession.

The significance of this language is twofold; in the first place, it distinctly directs that the "agent, attorney, or employee" of the owner of the property, of whatsoever kind or description, is equally culpable with the owner himself, wherever the latter might be, and the action of the agent, attorney, or employee is made the action in fact of the owner of the property; secondly, such property is declared "to be lawful subject of prize and capture wherever found." Therefore, under the above-cited section of the act under which proceedings in this case were instituted and terminated, the owner of the vessel became merged in person and interest in the captain of the vessel, who, as his "agent or employee," under the statute, was to all intents and purposes the owner of the offending property.

CONDEMNATION PROCEEDINGS UNDER ACT AUGUST 6, 1861.

We have contended that claimant's intestate had no just rights in law, because—

First. The taking of the vessel by a detachment of men from the Union forces was a capture by the Army, and that therefore the title at once vested in the United States.

Secondly. That by the act of March 3, 1800, upon which claimant relies, upon the supposition that the taking of the vessel was a prize capture, claimant's intestate is barred from recovery because, when taken by the Union forces, the property was "a vessel of war."

Thirdly. That the vessel when captured by the Union forces was itself contraband property, under the act of August 6, 1861, and that therefore all rights to a recovery for the value thereof were forfeited by the owner thereof when, through his "agent or employee," he suffered it to be voluntarily turned over to the enemy for use by them against the Union.

We would, indeed, be willing to rest upon these three propositions; but it is insisted by counsel for appellant that, upon the supposition that the taking of the vessel was a capture by the Navy, a prize capture, the subsequent condemnation proceedings were fatally irregular. This phase of the question, therefore, we will briefly discuss.

August 6, 1861, Congress passed an act providing for the disposition of property captured in any manner, and which the owner had used or allowed to be used in aid of the insurrection against the United States. The act provides for an adjudication of the facts in the circuit or district courts. (12 Stat. L., 319.)

Proceedings under this statute, while not cases in admiralty, were to conform to the practice and procedure in admiralty. (*Insurance Co.* v. *United States*, 6 Wall., 759.)

In ordinary use the words "prizes and capture" refer, doubtless, to captures on the waters as maritime prize;

but in the section under consideration (act August 6, 1861) they plainly refer to property taken on land as well as on water. In this the provisions of the act of August 6, 1861, differ vitally from the provisions of the act of 1800.

The libel, confiscation, and sale of this vessel of war, in the district court for the southern district of Illinois, conformed in all respects to the provisions of the August 6, 1861, statute.

Finding IX of the court below recites in full the record of the United States district court for the southern district of Illinois, and it there appears that from the time of the filing of the libel by the district attorney to and including the decree of the court the proceedings were regular in every respect and carried all the force and power necessary to lawfully divest claimant of title to his interest in the steamer *Eastport* and vest it in the United States.

The second section of the act provides "that such prize and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized or into which they may be taken and proceedings first instituted."

Following the above section we find the directions of section 3, as follows:

> SECTION 3. *And be it further enacted*, That the Attorney-General, or any district attorney of the United States in which said property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the bene-

fit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts.

The findings of the court below, setting out the proceedings before the district court, show that the requirements of the above section were fully complied with.

It is contended, however, that the proceedings were void because there was no Presidential order authorizing them. In support of this position counsel for appellant cites the *Winchester Case* (99 U. S., 372).

In the Winchester Case it was contended by the Attorney-General that the proceedings could be sustained under the confiscation act of July 17, 1862. In delivering the opinion of the court Mr. Justice Field referred only to the act of July 17, 1862, and to the captured and abandoned property act of March 3, 1863 (12 Stat. L., 820), and to no others. The Winchester Case had nothing whatever to do with the act of August 6, 1861, under which the libel proceedings in *the case at hand* were instituted. The seizure in the Winchester Case did not occur until February, 1863, when the act of July 17, 1862, was in full force and effect, whereas in the case at hand the seizure took place February 7, 1862, necessarily *before* the confiscation act of July 17, 1862, was law. Every detail of proceeding was under the act of August 6, 1861. This court's decisions in the case of *Pelham* v. *Rose* (9 Wall., 103), *The Confiscation Cases* (20 id., 92), and the *Winchester Case* (99 U. S., 372) were based upon a consideration of the act of July 17, 1862, and the captured

and abandoned property act of March 3, 1863, and had no reference whatever to the act of August 6, 1861, under which the United States district court proceeded in the case now under consideration.

While we insist that the proceedings in this case were not had under the act of July 17, 1862, but under the act of August 6, 1861, we nevertheless desire to invoke the principle here that the act of the Attorney-General, or the district attorney, or the marshal, constituted the act of the President, and must be regarded, in the case of property liable to seizure and confiscation, as a direction given by the President.

In this connection let us refer this court to the language of its opinion in *The Confiscation Cases* (20 Wall., 108–109):

> Undoubtedly, also, only such property as has been seized by Executive order is within the power of that court for confiscation proceedings. But it is a mistaken assertion that the record in this case does not show an Executive seizure of the property condemned before the district court assumed any jurisdiction over it. * * * If the seizure was made by virtue of the act of Congress, as the information avers it was, it was necessarily caused to be made by the President, for he only was empowered by the act to cause it. (Act of July 17, 1862.) Then the Attorney-General must have been the agent of the President to give instructions to the district attorney, and through him to the marshal. The language of the statute is: "It shall be the duty of the President to cause the seizure," etc. This implies that the seizure is to be made by the agents of the President, and a direction given by the Attorney-Gen-

eral to seize property liable to confiscation under the act of Congress must be regarded as a direction given by the President. In *Wilcox* v. *Jackson* (13 Peters, 498) it was ruled that the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. The same doctrine was asserted in *United States* v. *Eliason* (16 Peters, 291).

Still more significant, however, is the language of the above-cited opinion, as follows:

> But whether this be so or not, it is *sufficient that the information in this case avers the seizure was made by virtue of an act of Congress.* It must therefore have been caused by the President.

In Finding IX of the court below we find the fact set out that the libel filed by the United States district attorney distinctly stated:

> Said seizure was made for the reason that said steamer was used by and with the knowledge and consent of the owner in aiding the present rebellion against the United States, *contrary to the act of August 6, 1861.*

There we find the requirement of the law, as stated in the above-cited opinion, fully complied with, inasmuch as the information avers the seizure was made by virtue of and contrary to the provisions of an act of Congress.

It would seem that this would be sufficient to overcome the contention of appellant that no Executive order, or its equivalent, preceded the libel, condemnation, and sale of the captured property.

If, therefore, this court should decline to accept the view of the court below, that the capture in this case was

a capture of the Army, and not of the Navy, and should hold, on the contrary, that it was a marine capture; that the property was the lawful subject of prize, and that proper condemnation proceedings should have followed, then, we insist that we have shown that even in this view of the case the proceedings in the district court were wholly regular and entirely in conformity to the act of August 6, 1861, and that the title of the claimant was therefore divested, and all rights duly vested in the United States according to law.

And finally, even under the act of 1800, upon which appellant relies, the subject of this action is clearly excluded from the benefits of the act by the additional provisions that recovery after recapture is only possible in case of "such vessels or goods *not having been condemned as prize by competent authority.*" In this case the condemnation proceedings followed the only alleged capture "as prize," and were regular and the authority competent, and the offending property for this additional reason thus excluded from the provisions of the act of 1800.

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